

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 17, 2005

IN RE:

PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT
BETWEEN BELL SOUTH
TELECOMMUNICATIONS, INC. AND
NUVOX COMMUNICATIONS, INC.

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DOCKET NO.
04-00133

ORDER ESTABLISHING BRIEFING SCHEDULE

This matter came before the Hearing Officer pursuant to a status conference held on February 4, 2005. At that status conference, the parties in this docket discussed how best to bring the issues raised in various filings before the panel for a decision. As a result of those discussions, the Hearing Officer established a schedule for the filing of briefs addressing the legal issues raised by the parties, as more fully discussed below.

BACKGROUND

Because this Order addresses procedural matters, only a brief overview of the parties' positions and filings to date will be presented. On May, 4, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed the *Complaint of BellSouth Telecommunications, Inc to Enforce Interconnection Agreement and Request for Expedited Proceedings* ("Complaint") seeking to enforce the audit provisions in its interconnection agreement with NuVox Communications, Inc. ("NuVox"). In its *Complaint*, BellSouth alleges that it is entitled to audit NuVox's records to verify the type of traffic being placed over combinations of loop and transport network elements. BellSouth states that it has given NuVox notice of its intent to

conduct an audit to verify whether NuVox's use of its Enhanced Extended Links ("EELs") comports with NuVox's self-certification. NuVox has refused to allow the audit in what BellSouth asserts is a contravention of NuVox's obligations under the parties' interconnection agreement. BellSouth requests that its *Complaint* be handled on an expedited basis, based upon the fact that the Authority has previously ruled in TRA Docket No. 02-001203¹ that a similar interconnection agreement allowed for the audit of converted EELs and that, as a result of that ruling, BellSouth was not required to articulate a justification prior to the commencement of the audit. BellSouth also states that NuVox insists that BellSouth provide NuVox with a reason for conducting the audit that is satisfactory to NuVox prior to the initiation of the audit, that NuVox objects to the auditor selected by BellSouth and that NuVox has raised other issues as well.

On June 11, 2004, NuVox filed its *Answer of NuVox Communications, Inc.*, in which it generally asserts that BellSouth's complaint is frivolous and should be dismissed. NuVox states that the interconnection agreement does not provide BellSouth with unfettered discretion to conduct an audit of all converted EELs. NuVox asserts that the Georgia Public Service Commission ("Georgia Commission") found in reviewing the same issues and same relevant provisions of the interconnection agreement that BellSouth must demonstrate a concern prior to conducting an audit of particular converted circuits and it must hire an independent auditor to conduct the audit. Because NuVox asserts that BellSouth has not complied with either of these requirements, NuVox is not in violation of the interconnection agreement. NuVox states that the Pre-Hearing Officer's Report and Recommendation in TRA Docket No. 02-001203 is not binding or relevant because NuVox and BellSouth have their own interconnection agreement

¹ See *In re Enforcement of Interconnection Agreement Between Bellsouth Telecommunications, Inc and ITC^DeltaCom Communications, Inc and Enforcement of Interconnection Agreement Between Bellsouth Telecommunications, Inc and XO Tennessee, Inc*, TRA Docket No 02-01203, *Order Approving Report and Recommendation* (September 29, 2004) ("TRA Docket No 02-01203")

separate and distinct from the one in that docket. NuVox does not oppose expedited treatment of the docket, but submits that the best means to do so would be by either the Authority's immediate dismissal or denial of BellSouth's *Complaint* or incorporating the record of the Georgia Commission's proceedings into the record of this proceeding. NuVox states that, because BellSouth has asked the TRA to review the same issues as those that were before the Georgia Commission, interpreting the same interconnection agreement under governing principles of Georgia contract law (which NuVox asserts applies in Tennessee as well), incorporating the pleadings prepared in the Georgia proceeding and the hearing transcript would facilitate the TRA's resolution of the issues in the docket.

On August 24, 2004, NuVox filed its *Motion to Adopt Procedural Order*, in which it requests that the Authority: (1) adopt and incorporate the record of the Georgia Commission in the nearly identical proceeding already litigated; (2) adopt the same legal conclusions reached by the Georgia Commission; (3) establish a schedule for oral argument and briefing if the Authority considers adopting legal conclusions that are different from the conclusions of the Georgia Commission; and (4) establish a schedule for pre-filed testimony and a limited evidentiary hearing on Tennessee-specific factual issues.

On September 8, 2004, BellSouth filed its *Opposition of BellSouth Telecommunications, Inc. to NuVox's Motion to Adopt Procedural Order* ("*BellSouth's Opposition*"). BellSouth states that NuVox's procedural motion is an attempt to convince the TRA to defer to the findings and conclusions of another state commission and to distract the TRA from its own precedent in TRA Docket No. 02-01203. BellSouth asserts that under Section 252(e),² each state commission is authorized to approve or reject agreements and that, upon approval, each state interconnection agreement became the law governing the parties' interconnection relationship in that state and

² 47 U.S.C. 252(e)

that state only. BellSouth states that the TRA has a duty to interpret and enforce the agreement it approved. BellSouth also argues that the Georgia Commission's findings were incorrect. BellSouth suggests that summary judgment may provide a process for resolution of the docket.

On September 27, 2004, NuVox filed *NuVox Communications, Inc 's Motion for Leave to File Reply to BellSouth Telecommunications, Inc 's Response to NuVox's Motion to Adopt Procedural Order* ("Motion to File Reply"). Accompanying the *Motion to File Reply* was NuVox's *Reply to Opposition of BellSouth Telecommunications, Inc to NuVox's Motion to Adopt Procedural Order* ("NuVox's Reply"). In the *Motion to File Reply*, NuVox asserts that it needs to file a reply to address the arguments and precedents cited in *BellSouth's Opposition*. In *NuVox's Reply*, it states that it was not attempting through the *Motion to Adopt Procedural Order* to usurp the TRA's authority to enforce the parties' interconnection agreement, but was seeking to focus the proceeding on factual issues specific to Tennessee and not on legal issues that it stated had been resolved under the applicable Georgia law by the Georgia Commission. Specifically, NuVox again requests that the Authority: (1) adopt and incorporate the record of the Georgia Commission in the "nearly identical proceeding" already litigated; (2) adopt the same legal conclusions reached by the Georgia Commission; (3) establish a schedule for oral argument and briefing if the Authority considers adopting legal conclusions that are different from the conclusions of the Georgia Commission; and (4) establish a schedule for pre-filed testimony and limited evidentiary hearing on the remaining legal/factual disputes. NuVox argues that the Georgia Commission has already decided most of the legal issues in dispute in this docket and those decisions constitute binding precedent. NuVox further argues that neither the Pre-Hearing Officer's recommendations in TRA Docket No. 02-001203 nor the Authority's adoption of those recommendations is binding legal precedent applicable to this case. Finally,

NuVox opposes BellSouth's suggestion that it is appropriate to resolve this case through cross summary judgment motions because there are material issues of fact in dispute.

FEBRUARY 4, 2005 STATUS CONFERENCE

At the status conference held on February 4, 2005, the Hearing Officer, after noting that BellSouth had not filed an objection to the NuVox's *Motion to File a Reply*, granted the *Motion to File a Reply* and deemed *NuVox's Reply* to be filed. The Hearing Officer then opined that the issues raised in the *Motion to Adopt Procedural Order*, *BellSouth's Opposition* and *NuVox's Reply* were more substantive than procedural and inquired of the parties how best to proceed in this docket. After a lengthy discussion, the parties agreed to a two-step process where in the first part, the legal issues raised would be briefed by the parties and decided by the panel. Depending upon the decision by the panel, a second part of the process might be needed to develop the evidentiary record with Tennessee-specific facts. The Hearing Officer limited the filing of any part of the record of the proceeding before the Georgia Commission to those parts of the record specifically related to the legal issues being briefed. In addition to the legal issues previously raised by the parties, the Hearing Officer requested that the parties brief the following issue:

Whether the parties may, through a contractual provision in their interconnection agreement, limit the Authority's jurisdiction or ability to interpret that contract?

A briefing schedule was adopted, as set forth below:

Friday, March 4, 2005

Initial briefs of both parties
due no later than 2:00 p.m.

Friday, March 18, 2005

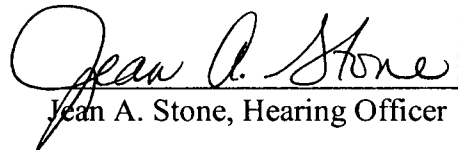
Reply briefs of both parties
due no later than 2:00 p.m.

REQUEST FOR EXTENSION OF TIME

Subsequent to the status conference, on March 16, 2005, NuVox requested additional time to file its reply brief. Specifically, NuVox requested that the deadline be extended from March 18, 2005 to March 21, 2005. BellSouth did not oppose the request. The Hearing Officer finds that this request is well-taken and that the reply briefs for both NuVox and BellSouth should be filed no later than **2:00 p.m. on Monday, March 21, 2005**. A date for oral arguments on the legal issues being briefed will be determined after the filing of the briefs.

IT IS THEREFORE ORDERED THAT:

1. *NuVox Communications, Inc.'s Motion for Leave to File Reply to BellSouth Telecommunications, Inc.'s Response to NuVox's Motion to Adopt Procedural Order* is granted and the *Reply to Opposition of BellSouth Telecommunications, Inc. to NuVox's Motion to Adopt Procedural Order* is deemed filed; and
2. The briefing schedule is established as set forth herein.


Jean A. Stone, Hearing Officer